IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

CRL.A.No. 266 of 2003(C)

SC.156/2000 of ADDITIONAL SESSIONS JUDGE (ADHOC)-II, KASARAGOD

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APPELLANT: ACCUSED

JAGADEESH, AGED 26 YEARS,
S/O. MADHAVAN, KADOOR, ATUKKATHUBAYAL,
KASARAGOD DISTRICT.

BY ADV. SRI.M.SASINDRAN
SRI.K.P.HARISH

RESPONDENT: RESPONDENT:

STATE - REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.266 OF 2003

Dated this the 5th day of September, 2007.

JUDGMENT

The sole accused in S.C.No.156/2000 on the file of the Additional Sessions Court (Adhoc-II), Kasaragod, challenges the judgment of the trial court in this appeal. By the impugned judgment, the trial court found the appellant guilty under Section 55 (a) of the Abkari Act for having found in possession of 10 liters of arrack on 23.6.1999 at about 5.15 p.m at his house premises in Adukkathubail village within the limits of Kasaragod Police Station and he was convicted thereunder and sentenced to undergo R.I for one year and to pay a fine of Rupees One lakh with default sentence of payment fine, to undergo R.I for a period of six months.

2. The prosecution case against the appellant was that when PW2 and some other women volunteers searched the house of the appellant, found two plastic cannas were kept in the cowshed of the house of the appellant and each of the cannas contained six and 4 liters of arrack respectively. On finding of the cannas, PW2 went to the Kasaragod Police Station and informed the matter to

PW1 – the Sub Inspector of Police and thereupon the Sub Inspector of Police and other police officials reached the spot and found MOs 1 and 2, the two cannas were kept in the courtyard of House No.32/306 and after preparing Ext.P1 seizure mahazar, both MOs 1 and 2 were seized and the samples were collected for analysis. On completing the investigation, PW5 filed the final charge before the court on the basis of Ext.P6 chemical report as per which it w as reported that the sample contained alcohol by 54.45% by volume. To prove the case against the appellant, the prosecution examined four witnesses and relied on Exts.P1 to P6. When the appellant was questioned under Section 313 of the Code, he denied the prosecution charge and had stated that the case was foisted against him on the instigation of his enemies. However, the trial court accepted the prosecution evidence and found the appellant guilty as aforesaid.

3. The learned counsel appearing for the appellant had taken the following contentions for challenging the judgment of the trial court. Firstly, it is contended that PW1, the Sub Inspector of Police, had not complied with the provisions of Section 36 of the Abkari Act and provisions of the Kerala Excise Manual while conducting search

of the house and seizing of the contraband articles. Secondly, it is contended that there is no evidence before the court to identify the accused as the person who is responsible for keeping Mos1and 2 at the cowshed of House No.32/306 as alleged in the prosecution. Thirdly it is contended that the prosecution had not produced any evidence to show that the house premises from which MOs 1 and 2 alleged to have been seized belong to the appellant and the appellant is responsible for keeping the contraband as alleged by the prosecution. Lastly, it is contended that the prosecution had not produced any evidence regarding production of the sample and the residue before the court in time and a delay of more than 11 days occurred in producing the contraband and the sample before the court has not been explained.

4. The question to be decided in this appeal is whether the judgment of the trial court is justifiable or not. The specific case of the prosecution against the appellant was that PW2 and other women volunteers were in search of selling of arrack in the locality and on the day of the incident, PW2 and other women volunteers found MOs 1 and 2 were seen kept at the cowshed of House No.32/306 of Adukkathubail village and thereafter PW2 went to

the Kasaragod Police Station and informed the matter to the Station House Officer. On the basis of the information furnished by PW2, the Sub Inspector of Police – PW1 went to the house premises and seized MOs 1 and 2, out of which samples were also collected as per the rules. The evidence of Pws 1 and 2 would show that MOs 1 and 2 were seen kept at the courtyard of House No.32/306 and the samples were also collected for analysis. The evidence of these witnesses would show that MOs 1 and 2 contained 6 and 4 liters of arrack. The trial court believed the evidence of Pws 1 and 2 on this aspect. The question to be considered is whether the appellant is responsible for keeping MOs 1 and 2 at the cowshed or not. In this context, the evidence of Pws 1 and 2 would show that they were not acquainted with the appellant previously and the appellant was not arrested during the course of investigation also. Further, when a specific question was put to PW2 regarding identity of the person, who was responsible for keeping of MOs 1 and 2 at the cowshed, he had answered that:

Further this witness has stated that:

When PW1 was questioned regarding the identity of the appellant as the person who was responsible for keeping MOs 1 and 2 at the courtyard of the house, this witness has stated in chief that:

Further this witness has stated that:

But, at the same, this witness has also stated that:

5. Apart from the above evidence of these witnesses, the prosecution had not produced any evidence to connect the appellant with keeping of MOs 1 and 2 at the courtyard. Apart from the above infirmity in the evidence of Pws 1 and 2 with regard to the ownership and possession of House No.32/306 of Adukkathubail village, the prosecution had not adduced any evidence to show that the above house and the cowshed belonging to either the appellant or his father, Madhavan. In this context, the evidence of PW4, the investigating officer is also relevant. The specific case of PW4 before the court was that he had not verified any records, either village or panachayat, to show that the house and the cowshed belong to either the appellant or his father. This witness has only stated that:

But even in the re-examination, this witness has only stated that:

But this witness has not produced the ration card . In the above circumstances, the identity of the appellant as the person, who was responsible for keeping MOs 1 and 2 at the courtyard of house No.32/306, is not fully established. In this context, Exts.D1 and D2 produced by the appellant would show that he is a resident of House No.32/307 of Kasaragod Municipality. In the above circumstances, even if the evidence of Pws 1 and 2 is accepted, the prosecution had failed to prove that the appellant was responsible for keeping MOs 1 and 2 at the premises of House No.32/306 of Adukkathubail village. Yet another point also to be noted is that Pws 1 and 2 or PW4 had not identified the appellant as the person, who was responsible for keeping of MOs 1 and 2 at the house premises even at the court.

5. In the above circumstances, this Court is of the view that the prosecution had failed to connect the appellant with keeping of MOs 1 and 2 at the premises of House No.32/306. The next question to be considered is regarding the evidence adduced by the prosecution to prove the production of the contraband and the sample before the court in time. The alleged seizure was on 23.6.1999 whereas as per Ext.P4 property list the sample and the residue were produced

before the court on 5.7.1999. A delay of 11 days occurred in producing the sample and the residue before the court was not explained either by PW1 or by PW4. Apart from the delay, there was no explanation offered or any evidence has been adduced regarding the safe custody of MOs 1 and 2 and the samples still the same were produced before the court. In this context, the evidence of PW4 is to the effect that he was not aware about keeping of the sample and the residue before the same produced before the court. On this aspect also, this Court has got doubt regarding seizure and production of MOs 1 and 2 and the sample before the court. In this context, finding of the trial court that non- explanation of delay and non-production of the evidence regrading keeping of the contraband in safe custody would not prejudice the appellant is not justifiable. However, as this Court had found that the prosecution had failed to prove identity of the appellant as the person responsible for keeping of MOs 1 and 2, which contained arrack, the question of other contentions raised by the learned counsel for the appellant need not be considered further. In the light of the findings entered by the court below and an over all appreciation of the evidence adduced by the prosecution, this Court finds that the prosecution had failed to prove the case against the appellant beyond

reasonable doubt. Hence, benefit of doubt has to be given to the appellant.

In the above circumstances, the finding entered against the appellant under Section 55 (a) of the Abkari Act and the conviction and sentence ordered against the appellant are hereby set aside and the appeal is allowed. The appellant is acquitted. The bail bonds executed by the appellant shall stand canceled . It is also made clear that if the appellant had remitted any amount by way of fine, that shall be released to him as per law.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.266 OF 2003

JUDGMENT

5th September, 2007.